Supreme Court U S
MAR 29 2010
OFFICE OF THE CLERK

No. 09-1030

In The Supreme Court of the United States

SHERRI KOEHNKE,

Petitioner,

vs.

CITY OF McKEESPORT; E. MICHAEL ELIAS, Individually and as an Agent and Employee Thereof; and TOM CARTER, Individually and as an Agent and Employee Thereof,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION OF RESPONDENTS, CITY OF McKEESPORT, E. MICHAEL ELIAS AND TOM CARTER

P. BRENNAN HART, ESQUIRE*
JEANETTE H. HO, ESQUIRE
PIETRAGALLO GORDON ALFANO BOSICK & RASPANTI, LLP
One Oxford Centre, 38th Floor
Pittsburgh, Pennsylvania 15219
(412) 263-2000
pbh@pietragallo.com

Counsel for Respondents, City of McKeesport, E. Michael Elias and Tom Carter

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

COUNTER-STATEMENT OF THE FACTS 1

ARGUMENT 5

A. The Petition for Writ of Certiorari is based upon an Incorrect Premise – the Third Circuit's Decision was based upon an Application of Pennsylvania State Law Relating to the Tolling of the Statute of Limitations not, as Petitioner Contends, on the Application of Federal Law on when a Federal Cause of Action Accrues 5

B. Petitioner is Essentially Asking this Court to Adopt a Federal Common Law Statute of Limitations for Section 1983 Claims and to Over-Rule the Well-Settled Principle that the Statute of Limitations for these Causes of Action are Governed by State Law 7

C. The Third Circuit Properly Determined that Petitioner was not Entitled to a Tolling of the Statute of Limitations under Pennsylvania State Law because She had Failed to Exercise Reasonable Diligence 8

D. The District Court's Entry of Summary Judgment was not Premature because Petitioner Failed to Comply with Federal Rule of Civil Procedure 56(f) 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Wallace v. Kato, 549 U.S. 384, 127 S. Ct. 1091, 166 L.Ed.2d 973 (2007) 5, 7, 8

STATUTES

42 U.S.C. §1983 ..... *passim*

RULES

Fed.R.Civ.P. 56(f) 10, 11

INTRODUCTION

This is a civil rights action which was filed with the United States District Court for the Western District of Pennsylvania. This case was related to another suit styled *Tanya Nicole Kach v. Thomas Hose, et al.*, that was also pending before the District Court. In *Kach*, Tanya Kach alleged, *inter alia*, that the City of McKeesport, E. Michael Elias and Tom Carter, in his capacity as Chief of the McKeesport Police (collectively referred to as the "City of McKeesport Defendants"), supposedly violated her constitutional rights when they purportedly failed to investigate her disappearance properly and rescue her after she ran away from home and went to live with a school security guard by the name of Thomas Hose. In this case, Petitioner[1] – who is Tanya Kach's mother – claims that the alleged conduct of the City of McKeesport Defendants purportedly violated Petitioner's constitutional rights, as well.

COUNTER-STATEMENT OF THE FACTS

Petitioner fails to set out the factual background which led the District Court and the United States

[1] While this Petition was filed *pro se*, Petitioner was represented by counsel during the proceedings which took place before the District Court. Petitioner's counsel was subsequently disbarred (for reasons unrelated to this matter), but the United States Court of Appeals for the Third Circuit allowed him to continue representing Petitioner during the course of the appeal.

Court of Appeals for the Third Circuit to conclude that her claims were barred by the statute of limitations.

As noted above, Petitioner is the mother of Tanya Kach. *See* Opinion dated October 28, 2009, p. 2a.[2] In early 1996, Tanya Kach lived with Petitioner's ex-husband, Jerry Kach, Jr., in McKeesport, Pennsylvania. *Id.* On February 10, 1996, Tanya Kach ran away from home. *Id.* Unbeknownst to her parents, Tanya Kach had developed a relationship with Thomas Hose. *Id.* On the day that she ran away from home, Tanya Kach moved in with Thomas Hose without informing anyone of her whereabouts. *Id.*

After Petitioner learned that her daughter was missing, she noticed Thomas Hose's telephone number on a telephone bill for the date when Tanya Kach had last visited her home.[3] *Id.* Petitioner called Thomas Hose to ask him if he knew anything about her daughter's whereabouts. *Id.* After Petitioner spoke to Thomas Hose, she and her husband visited the McKeesport Police Department, where she spoke to Officer Elias. *Id.* Petitioner informed Officer Elias

---

[2] The opinions issued by the Third Circuit and District Court are attached to the Petition for Writ of Certiorari. The City of McKeesport Defendants refer to these opinions in setting forth the procedural and factual background for this case.

[3] Petitioner and her husband were deposed during the *Kach* case. The City of McKeesport Defendants referenced this deposition testimony in the Motion to Dismiss, or in the alternative, Motion for Summary Judgment that was filed with the District Court.

that Tanya Kach was friends with Thomas Hose and that she had called him before her disappearance. *Id.* Petitioner also told Officer Elias that she had called Thomas Hose and that he had denied knowing her daughter. *See* Opinion dated October 28, 2009, pp. 2a-3a. The police went to Thomas Hose's house and spoke to him but did not enter the residence because Thomas Hose told them that his parents were sleeping. *See* Opinion dated October 28, 2009, p. 3a.

In 1998 or 1999, Petitioner again informed the McKeesport Police Department that she suspected that Thomas Hose was involved in her daughter's disappearance. *Id.* The officer to whom she spoke informed Petitioner that the department had investigated Thomas Hose and determined that he had nothing to do with Tanya Kach's disappearance. *Id.*

On March 21, 2006, Tanya Kach disclosed her identity to the owner of a local convenience store and told him that she had been living with Thomas Hose for the last ten years. *Id.* The owner of the store contacted the authorities, and law enforcement officers removed Tanya Kach from Thomas Hose's house. *Id.* In the days following these events, Tanya Kach's reappearance and the fact that she had spent the last decade living with Thomas Hose were covered extensively in the media and reporters had "camped out" in front of Petitioner's house. *Id.* Petitioner spoke with Tanya Kach on March 23, 2006, and saw her in person the next day. *Id.*

Petitioner filed a Complaint against the City of McKeesport Defendants on June 2, 2008. *Id.* The City of McKeesport Defendants filed a Motion to Dismiss or, in the alternative, Motion for Summary Judgment. *See* Memorandum and Order dated October 24, 2008, p. 10a. In said Motion, the City of McKeesport Defendants argued that, *inter alia*, Petitioner's claims were barred by the statute of limitations. *Id.*

By Memorandum Opinion and Order dated October 24, 2008, the District Court held that Petitioner's claims were barred by the statute of limitations, granted the City of McKeesport Defendants' Motion for Summary Judgment and dismissed Petitioner's claims with prejudice. *See* Memorandum and Order dated October 24, 2008, pp. 9a-18a. This determination was subsequently affirmed by the Third Circuit in an unpublished opinion issued on October 28, 2009. *See* Opinion dated October 28, 2009, pp. 1a-8a. Petitioner's Petition for Rehearing *En Banc* was denied by Order dated November 23, 2009. *See* Order dated November 23, 2009, p. 19a.

ARGUMENT

A. The Petition for Writ of Certiorari is based upon an Incorrect Premise – the Third Circuit's Decision was based upon an Application of Pennsylvania State Law Relating to the Tolling of the Statute of Limitations not, as Petitioner Contends, on the Application of Federal Law on when a Federal Cause of Action Accrues.

Petitioner contends that the Third Circuit's decision supposedly conflicts with determinations issued by other Circuits regarding when a cause of action accrues. *See* Petition for Writ of Certiorari, pp. 7-11. However, neither the Third Circuit nor the District Court, for that matter, based any analysis on when Petitioner's Section 1983 cause of action accrued.

In arriving at its determination that the District Court did not err in concluding that Petitioner's claims were barred by the statute of limitations, the Third Circuit correctly noted that this Court had held in *Wallace v. Kato*, 549 U.S. 384, 127 S. Ct. 1091, 166 L.Ed.2d 973 (2007), that claims brought pursuant to 42 U.S.C. §1983 are subject to the statute of limitations which the state provides for personal-injury torts which in Pennsylvania is two years. *See* Opinion dated October 28, 2009, p. 5a. Citing again to *Wallace*, the Third Circuit went on to state that a Section 1983 claim ordinarily accrues at the time when the injury is sustained – i.e. when the plaintiff has a complete and present cause of action. *Id.* However, the Third Circuit's decision was not based upon when

Petitioner's cause of action accrued. Rather, the Third Circuit (and the District Court) examined whether the statute of limitations should be tolled under Pennsylvania's discovery rule. *See* Opinion dated October 28, 2009, pp. 5a-7a and Memorandum and Order of Court dated October 24, 2008, pp. 14a-16a. Both courts determined that Petitioner was not entitled to tolling under Pennsylvania law because she did not use reasonable diligence in investigating her potential claim. *Id.*

In light of the above, the Petition for Writ of Certiorari should be denied because it is based upon the incorrect premise that the Third Circuit's decision was founded upon an analysis of when Petitioner's Section 1983 cause of action accrued.

To the extent that the opinions cited in the Petition for Writ of Certiorari reveal disagreement among the Circuits regarding when a federal cause of action accrues, any such dispute should have no bearing upon the Court's disposition of this Petition because when Petitioner's Section 1983 cause of action accrued had no bearing upon the Third Circuit's (or the District Court's) determination that Petitioner's claims were barred by the statute of limitations. Rather, the Third Circuit's (and District Court's) decision was based solely on the application of Pennsylvania state law on tolling.

B. Petitioner is Essentially Asking this Court to Adopt a Federal Common Law Statute of Limitations for Section 1983 Claims and to Over-Rule the Well-Settled Principle that the Statute of Limitations for these Causes of Action are Governed by State Law.

It is well-established that because Congress did not specify the time for bringing a Section 1983 claim, the courts are to look to the statute of limitations which the states have adopted for initiating a personal injury cause of action. *See Wallace*, 549 U.S. at 388, 127 S. Ct. at 1094. This Petition for Writ of Certiorari is nothing more than an attempt to have this Court over-rule this well-settled precedent in favor of the establishment of a federal statute of limitations for all Section 1983 claims.

As an initial matter, the City of McKeesport Defendants respectfully submit that if Petitioner wishes to establish a uniform statute of limitations for civil rights actions, she should approach Congress, not this Court.

Moreover, this Court has already made the policy choice that because Congress did not address questions relating to the length of the statute of limitations and tolling when it enacted Section 1983, these issues are to be governed by state law. To the extent that reference to state law results in differences between how the statute of limitations might be applied depending upon the state in which the action is brought, the City of McKeesport Defendants submit

that this was a necessary corollary of this Court's determination that state law would govern certain aspects of the statute of limitations. Petitioner does not explain why this choice was unwise or is in need of reconsideration.

C. The Third Circuit Properly Determined that Petitioner was not Entitled to a Tolling of the Statute of Limitations under Pennsylvania State Law because She had Failed to Exercise Reasonable Diligence.

As this Court stated in *Wallace*, while questions regarding when a Section 1983 action accrues is governed by federal law, state law determines whether the statute of limitations should be tolled. *Wallace*, 549 U.S. at 388, 394, 127 S. Ct. at 1095, 1098. As such, the Third Circuit properly looked to Pennsylvania state law to determine whether tolling was appropriate in this case. The City of McKeesport Defendants respectfully submit that it is not within the province of this Court (or any federal court) to question the wisdom of or to alter the substance of state law. Rather, the federal courts must take the state law as they find it and apply that law to the facts of the particular case.

The Third Circuit stated that under Pennsylvania's discovery rule, the statute of limitations may be tolled for situations in which a party, through no fault of his or her own, does not discover their injury

until after the statute of limitations normally would have run. *See* Opinion dated October 28, 2009, pp. 5a-6a. According to the Third Circuit, a plaintiff who is attempting to take advantage of the discovery rule has the burden of demonstrating that he or she exercised reasonable diligence in determining the existence and cause of his or her injury. *See* Opinion dated October 28, 2009, p. 6a. To demonstrate reasonable diligence, a plaintiff must establish that he or she pursued the cause of his or her injury with those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interests and the interests of others. *Id.*

Applying the foregoing principles to this case, the Third Circuit noted that the record showed that as of March 24, 2006, at the latest, Petitioner knew (or had every reason to know): 1) that she had informed the Police Department of the basis for her suspicions concerning Thomas Hose; 2) that the Department had assured her that it had investigated Thomas Hose and determined that he had nothing to do with Tanya Kach's disappearance and 3) that the Department's determination was erroneous. *Id.* The Third Circuit held that to the extent that Petitioner sustained a constitutional injury as a result of the allegedly inadequate investigation conducted by the police, she had, by March 24, 2006, sufficient critical facts to put her on notice that a wrong had been committed and that she needed to investigate to determine whether

she was entitled to relief. *See* Opinion dated October 28, 2009, pp. 6a-7a. Based upon this, the Third Circuit concluded that Petitioner had identified no evidence from which a jury could conclude that she exercised reasonable diligence and that the District Court had not erred in determining that the statute of limitations had expired on March 24, 2008, more than two months before Petitioner filed her Complaint. *Id.*

D. The District Court's Entry of Summary Judgment was not Premature because Petitioner Failed to Comply with Federal Rule of Civil Procedure 56(f).

The Petition for Writ of Certiorari is replete with claims that the District Court failed to provide Petitioner with the opportunity to conduct discovery before entering judgment in favor of the City of McKeesport Defendants.

What Petitioner fails to acknowledge, though, is that the Third Circuit held that if a party is claiming that a motion for summary judgment is premature and that he or she cannot present facts essential to justify that party's opposition to the motion, Federal Rule of Civil Procedure 56(f) requires that party to submit an affidavit demonstrating how evidence of such facts would preclude summary judgment. *See* Opinion dated October 28, 2009, p. 4a. The Third Circuit also held that in all but the most exceptional cases, the failure to comply with Rule 56(f) is fatal

to a claim of insufficient discovery on appeal. *See* Opinion dated October 28, 2009, p. 5a. The Third Circuit then noted that Petitioner had failed to file a Rule 56(f) affidavit, that this failure was fatal to her contention that the District Court's entry of summary judgment was premature and that there were no exceptional circumstances to justify her unexplained noncompliance with Rule 56(f). *Id.* The Third Circuit also noted that Petitioner did not need to conduct discovery in order to obtain evidence regarding what she knew and when she knew it. *Id.*

Petitioner does not claim that the Third Circuit's application of Federal Rule of Civil Procedure 56(f) is at odds with the manner in which it has been applied by this Court or other United States courts of appeals or that the interpretation of this rule presents a matter of first impression.

CONCLUSION

For all of the reasons set forth above, Respondents, the City of McKeesport, E. Michael Elias and Tom Carter, respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

PIETRAGALLO GORDON ALFANO
BOSICK & RASPANTI, LLP

P. BRENNAN HART, ESQUIRE
Counsel of Record
JEANETTE H. HO, ESQUIRE
One Oxford Centre, 38th Floor
Pittsburgh, PA 15219
(412) 263-2000

Counsel for Respondents,
City of McKeesport,
E. Michael Elias and
Tom Carter